IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
JORDAN, BRIAN G. and	)	**Case No. 99-20073-13**
JORDAN, HEATHER D.	)	
	)	
	)	**MEMORANDUM OF DECISION**
Debtors.	)	
	)	
	)	
_____	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

G. W. Haight, Coeur d'Alene, Idaho, for Debtors.

C. Barry Zimmerman, Coeur d'Alene, Idaho, Trustee.

Brian and Heather Jordan, Sandpoint, Idaho, appearing pro se.

This chapter 13 case, now dismissed, presents a dispute between an attorney and his clients. At issue is the allowance of compensation to debtors' counsel. That issue arises because the attorney would like the Trustee to distribute funds on hand in payment of his fees before the balance of the funds are returned to the debtors. His clients voiced their opposition to the request at hearing on March 7, 2000. The Court

took the matter under advisement to consider the issues thus raised in light of the entirety of the record.

BACKGROUND

Brian and Heather Jordan ("Debtors") filed a voluntary petition for relief under chapter 13 on January 27, 1999. G. W. Haight ("Counsel") was their attorney. Counsel advised and counseled the Debtors starting in November 1998, and his representation continued through the dismissal of the case in February 2000.

The Rule 2016(b) statement filed by Counsel in January 1999 indicates that he was paid $530.00 toward fees and received $160.00 for the Debtors' filing fee prior to the petition date.[1] He contemplated, according to the statement, receiving an additional $600.00 in fees (for a total of $1,130) through payments under the Debtors' chapter 13 plan, and the original plan so provided. The first amended plan raised the $600 to $1,500. By the time the last plan was presented to the Court in November 1999, Counsel was asking for $4,500 in compensation to be distributed to him by the Trustee.

Not long after the initial filing, disputes arose between the Debtors and creditor Belwood's Furniture ("Belwood"). Belwood objected to confirmation of the plan on the basis that the Debtors, acting in bad faith, proposed a value for Belwood's collateral

[1] The response to question no. 9 on the statement of affairs is incorrect. It discloses only payment of the $160.00 filing fee.

which was far below fair market value and even further below what the Debtors had agreed to pay not long before bankruptcy when they purchased the items.[2]

That matter was heard by the Court in May 1999, and a decision rendered which validated the creditor's concerns. Belwood's allowed secured claim was set at $10,050.00, not $1,575.00, and its pending motion for stay relief was conditionally granted unless the Debtors proposed a plan which funded that amount in accord with § 1325(a)(5). The Debtors were provided an additional period of time to propose such a plan.

Amended plans were proposed in June and again in November. There remained, after a confirmation hearing on December 14, only one issue to be resolved before the last amended plan could be confirmed -- the need for Counsel to file an affidavit justifying the $4,500 in fees sought to be allowed and paid under the plan.

Neither the affidavit nor a proposed order of confirmation appeared and, in late December 1999, the Trustee moved to dismiss the case under § 1307(c) since confirmation had not been achieved.

At hearing on the Trustee's motion to dismiss held on January 11, 2000, Counsel appeared for the Debtors and asked for ten days within which to convert the case to a chapter 7 liquidation or to amend the chapter 13 plan. He advised

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[2] The schedules and first proposed plan valued the collateral at $1,575. Evidence would later show that, within the year preceding filing, the Debtors had incurred over $21,000 of debt with Belwood, and that the purchase price of the subject carpet and furniture was between $15,000 and $16,000.

that the Debtors had fallen behind on their mortgage obligation, and would be surrendering their residence thus necessitating, at a minimum, a plan amendment. No other issues which imperiled confirmation were disclosed. The comments of Counsel made it evident that the Debtors had not yet decided how to proceed.

The Court granted the request and provided the Debtors ten days within which to convert the case to a chapter 7 liquidation or, alternatively, file and notice for hearing an amended chapter 13 plan. If neither occurred, the Debtors' counsel was advised that the case would be dismissed on the Trustee's motion without further notice or hearing.

The prescribed period came and went without an amended plan, a motion to convert, or any other submission or action by or on behalf of the Debtors. The Trustee lodged his "certification" that the conditions set by the Court at hearing which would forestall dismissal had not been met. On January 25, the Court entered an Order dismissing the case.

Immediately after the dismissal, Counsel filed an application for allowance of fees and costs totaling $5,828.00 (the "Application"). The Application alleged that $1,190.00 had been paid to Counsel, and therefore sought $4,638.00 from

the funds on hand with the Trustee.[3]

The Application was set for hearing on March 7. Notice was provided to all creditors and parties in interest, and also to the Debtors. While no written objection was filed, the Debtors appeared at the hearing and made several objections to Counsel's conduct of the case and to the fees and costs he sought to be awarded for that work.

DISCUSSION

Since the plan in this chapter 13 case was never confirmed, § 1326(a)(2) applies. That section requires the Trustee to return to the Debtors all funds on hand as of the date of the dismissal, except to the extent there are allowed administrative expenses under § 503(b). If such administrative expenses exist, they are paid first before the Debtors are reimbursed.

Section 1326(a)(2) was before this Court in *In re Barrera*, 99.2 I.B.C.R. 68 (Bankr. D. Idaho 1999). There the Trustee sought approval and payment of his expenses under § 503(b)(1)(A) before remitting the funds on hand to the debtor.

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[3] The total of $5,828.00, and the amount paid of $1,190.00, both include the $160.00 filing fee referenced in the statement of affairs and the Rule 2016(b) disclosure. Thus the total requested attorneys' fees and out of pocket costs is $5,668.00. However, a more serious issue is implicated by the Application's allegation that $1,190.00 in payments had been received. Recall that Counsel's Rule 2016(b) statement disclosed only a total of $690.00 paid prior to filing (the $160.00 filing fee and $530.00 in attorneys' fees). Detail in "Exhibit A" to the Application substantiates these prepetition payments. The extra $500.00 paid toward fees is found only in the detail to "Exhibit B" to the Application. This payment was made on May 5, 1999, about a week before the hearing on the Belwood matter. No supplemental Rule 2016(b) disclosure was ever made regarding this payment. The Court will return to this issue later in the decision.

While the issue here is the § 503(b)(2) administrative expense of Counsel and not compensation of the Trustee's expenses, the dynamics of the situation are the same. By virtue of their right to all funds on hand except to the extent § 503(b) expenses are allowed, debtors are inherently adverse to any administrative expense applicant.[4] The Court in *Barrera* alluded to this issue of competing interests between debtors and their own counsel.

> The burden is always upon an applicant seeking allowance of an administrative expense to justify the same. For example, counsel in unconfirmed chapter 13 cases, who seek allowance of their fees in order that the same can be paid under § 1326(a)(2) before funds are returned to the debtor, are under the same burden.

99.2 I.B.C.R. at 68-69. A footnote to that statement warned:

> Counsel seek their allowance under §§ 330 and 503(b)(2). They must provide clear notice to the debtor (essentially an adverse party by reason of § 1326(a)(2)), the U. S. Trustee and the trustee, as well as creditors under Rule 2002(a)(6) if applicable.

Id. at n.4.

In certain dismissed, unconfirmed chapter 13 cases, debtors are in full and complete support of their attorney's request for payment. In fact, the Court has observed some applications of this sort bear signature approval of the debtors, or are accompanied by affirmations that the debtors have reviewed and approved the request.

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[4] Of course, depending on the amount of funds available, administrative expense applicants may also be adverse to one another, providing additional reason for full and complete noticing of all such requests for allowance.

The present case illustrates why counsel might choose to run the request by the debtors before filing it with the Court – to determine if there are unresolved issues between the attorney and his clients. Here, the Debtors personally appeared at the March 7 hearing, to the apparent surprise of Counsel, and made several pointed objections concerning the fees requested and the conduct of Counsel, all before a crowded courtroom during what was for the most part an uncontested motion calendar. The Court is certain that neither Counsel nor the Debtors relished the experience.

Counsel believes that $5,668.00 is a reasonable and appropriate amount for his fees and costs in this failed chapter 13 case. The burden of establishing entitlement to compensation, and its reasonableness, is on Counsel. *In re Dale's Crane, Inc.*, 99.1 I.B.C.R. 8 (Bankr. D. Idaho 1999); *In re Ferreira*, 95 I.B.C.R. 282, 283 (Bankr. D. Idaho 1995). The factors to be considered in determining reasonableness include time spent; rate charged; necessity and benefit of services; whether the services were performed in a reasonable amount of time commensurate with the complexity of the issues, importance and nature of the issues presented; and whether the charges for services are comparable to those of equally skilled practitioners outside bankruptcy. *Id.*; § 330(a)(1), (3), (4). The Court may award less than what has been requested. § 330(a)(2).

The fundamental approach employed in this Circuit for evaluating reasonableness is calculation of a "lodestar" amount, which is generated by multiplying the number of hours spent in performing actual, necessary and reasonable

services by an appropriate hourly rate. *In re For-Rose Plumbing, Inc.*, 99.2 I.B.C.R. 69, 71 (Bankr. D. Idaho 1999); *In re Western Quay Assoc. Ltd. Partnership*, 94 I.B.C.R. 193, 194 (Bankr. D. Idaho 1994).

Counsel has provided an itemization of time spent which, at effective hourly rates of $105.00 for himself and $45.00 for his paralegals totals the amount set forth in the Application.

The Court does not find those hourly rates to be unreasonable for consumer debtor representation. The issues here, rather, relate to the services rendered and the conduct of the case.

Belwood collateral valuation and litigation

The Debtors' most serious charge is that Counsel refused to accept the Debtors' proposed valuation of their personal property which was collateral for the obligations owed Belwood and instead peremptorily inserted significantly lower values. Thus, the Debtors argue, it was Counsel's conduct that spawned the litigation with Belwood, and a great deal of the fees now claimed.

True, the Debtors signed their schedules and are bound by the assertions there made. Also, Mr. Jordan's testimony at the hearing on valuation was consistent with the scheduled values. But that's hardly surprising under the circumstances. The Debtors had already made their bed, and now were obligated to lie in it.

The Court is sensitive to the Debtors' argument that they were following their attorney's advice as to the proper method of valuing personal property in a

bankruptcy. Neither the scheduling nor Mr. Jordan's testimony negates the contention that the Debtors were relying on their counsel.

Yet while this allegation regarding Counsel's conduct is serious, the Court determines that, for the purposes of the present fee application, there is no need for an evidentiary inquiry and final resolution of the charge in favor of either the Debtors or Counsel. The record is sufficient, even in the absence of that inquiry, for the Court to conclude that Counsel's actions in regard to the Belwood issue were not justified. The litigation itself established that there was no good faith basis for the de minimis value urged. Counsel should not have pursued that line of attack in the absence of a defensible valuation, regardless of who first proposed the $1,575 figure. *Cf.,* Fed.R.Bankr.P. 9011(b)(3).

The Court's review of the Application discloses that $1,563.40 in fees and $85.00 in costs[5] is charged for services related to the abortive attempt to cramdown Belwood to a degree well beyond what could ever be supported on the evidence. While the Debtors participated in it, not all of the expense of this futile exercise should be borne by the Debtors via the allowance of the full fee requested.

The Court for the foregoing reasons concludes that an amount equal to one-half of these charges, $824.20, should be disallowed.

Services not rendered

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[5] This comes from a review of "Exhibit A" and "Exhibit B" detail, and includes all entries specifically related to the litigation with Belwood through those in early June regarding incorporation of the properly allowable amount of that creditor's claim into the plan. The costs shown are those assessed for incoming and outgoing faxes involving Belwood.

The Debtors argue that there are charges shown in the Application for phone calls which were not actually made. There is little specificity in regard to this objection. Mr. Jordan admits as much, and asserts that, had he known that an issue like this could arise, he would have kept a log of his contacts with Counsel so as to better impeach the assertions in the Application.

While the Court is loathe to reject this objection of the Debtors out of hand, in part because the Debtors were apparently not very sophisticated consumers of legal services and unaware of their right to demand detailed accounting,[6] the allegation that the Application misstates the facts regarding what Counsel or his paralegals did on a particular day can be given relatively little weight without more detail. No reduction will be made on the basis of this objection.

Inadequately described or supported charges

-- Phone calls

The Debtors also assert that Counsel excessively charged for such communications with the Debtors. Mr. Jordan points in particular to itemized charges when Counsel's paralegals talked with him by phone.

The Court does not find it improper for paraprofessional charges to be made in regard to communications with clients, so long as paraprofessional tasks rather than clerical or secretarial tasks were being performed.[7] Of course, not every call or letter

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[6] *See*, Idaho Rule of Professional Responsibility 1.5.

[7] *See, In re Pintlar Corporation*, 1994 WL 704476 (Bankr. D. Idaho 1994); *In re CF&I Fabricators of Utah, Inc.*, 131 B.R. 474, 489-493 (Bankr. D. Utah 1991); *In*

(continued...)

necessarily implicates delivery of paralegal services. The burden of establishing the propriety of the charge is on the applicant.

In reviewing the Application's detail concerning these communications, the Court finds several instances where less than adequate detail and explanation is provided. For example, "Phone/client" or "T/C w/client" or "Telecon to client" are not sufficient for paralegals any more than they are for lawyers.[8] As to entries regarding staff contacts with the Debtors, the Court will disallow $103.50 for those with unacceptably terse descriptions and/or which do not adequately reflect that some sort of paraprofessional services were rendered.

-- Other paralegal charges

A similar question arises in other instances where the time entries fall short of the mark in providing a functional description of the services rendered by the paraprofessional. For example, a paralegal performed "data entry" for 2 hours on 11/7/99 for which no charge is asserted. But "data entry" together with worksheet and plan services on 11/15/99 is charged. The Application doesn't explain whether the "data entry" on the latter date was somehow different from that on the earlier date, or even whether a charge is assessed for it.

Likewise, the entries charging paralegal time on 6/21/99 ("Serve creditors of the estate w/Motion for confirmation and Notice of hearing w/copy of Plan"), 2/22/99

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[7](...continued)
re Ginji Corporation, 117 B.R. 983, 993-94 (Bankr. D. Nevada 1990).

[8] *Ginji*, 117 B.R. at 993; *Dale's Crane*, 99.1 I.B.C.R. at 11, citing *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bankr. D. Utah 1985).

("Prepare reminder card re § 341(a) Meeting"), and 1/6/99 ("Draft letter forwarding Petition to clients") don't indicate that anything more than clerical or secretarial services were involved.[9] The Court will disallow $129.00 for such entries.

-- Combined entries; non-legal services by Counsel

Counsel at times, particularly in "Exhibit B", improperly "lumps" his services in a single entry.[10] *See, Pfeiffer v. Couch (In re Xebec)*, 147 B.R. 518, 525 (9th Cir. BAP 1992). Also, included in these entries are services such as "accessing RACER," "print drafts of motion, plan and worksheet" and "secure mailing list from internet; attempt to format mailing list" which could be performed by clerical staff. *Ginji*, 117 B.R. at 993-94. That such services were brief, only incidental to delivery of compensable services, or not charged is not clear.

Because of the presentation, it is impossible to segregate with accuracy properly allowable legal services from noncompensable ones. But, since some of the three lumped entries involve the Belwood dispute, which was already dealt with above, the Court concludes a reduction of $105.00, one hour's worth of time, is adequate to address the issue.

Other issues

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[9] Similar issues attend entries on 1/11, 2/5, 2/11, 8/3, and 11/6.

[10] For example, the entries for 4/22 (first entry), 6/4, and 6/10 suffer this defect.

On December 14, the case was ready to be confirmed once a fee affidavit was filed. At the time of this hearing, the Debtors had just entered into a stipulation providing for cure of their post-petition defaults to the mortgage creditor.[11]

By January 11, Counsel advised that due to these mortgage defaults the house would probably be surrendered. The Trustee at that hearing indicated that the Debtors were current in plan payments with the exception of the December 29 payment.

The Application detail shows limited interaction between Counsel and the Debtors during this entire time frame. It provides no clue as to why December's planned cure of default would be abandoned, or why a modified plan after surrender would not be pursued.

The ultimate failure of the case may have been either unnecessary or ill-advised. If so, the Debtors are harmed not only by the loss of this case (and the loss of any fees found allowable). They are also injured by the potential need to retain another attorney and prosecute another bankruptcy case. The record is murky on this point.

Counsel insists that amendment, conversion and dismissal were all thoroughly discussed with the Debtors, and that the Debtors made a knowing and voluntary

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[11] Mr. Jordan indicated that he understood the sole impediment to confirmation following the December 14 hearing was the missing fee affidavit. So did the Court. This gives rise to a question of why the affidavit was not timely filed. The plan appeared to be adequately funded, even with these fees, and the Trustee indicated that all requirements of § 1325 were met. While the Debtors were, at the same time, in default of their obligations to a mortgage lender, an inability to confirm was not manifest.

decision to let the case be dismissed on the Trustee's § 1307(c) motion. But Mr. Jordan's comments at the March 7 hearing reflect dissatisfaction with the advice received and the result of the case.

Again the Court finds that it need not conclusively resolve the apparent disagreement. Assuming that Counsel is correct when he asserts that dismissal was the mutually agreed result, then the January 13 entry does not reflect reasonable and necessary services. The budget issues were made irrelevant by dismissal, and the fee application was then solely in Counsel's interests, not the Debtors.[12] Indeed, this latter point was amply illustrated at the March 7 hearing. The January 13 entry of $210.00 is disallowed.

Fax charges

In the process of reviewing the Application detail, the Court noticed that all faxes, either sent or received, were subject to a separate "cost" charge in addition to any time billed for dealing with the fax. There is no explanation as to how the charges were calculated or assessed. Whether incoming or outgoing, faxes appear to be charged at varying rates from $1.00 to $11.00 in one instance and $37.00 in another. The average charges appear to be from $2.00 to $5.00 per faxed document. The charges total $137.00.

Chief Judge Pappas in *In re Young*, 98.2 I.B.C.R. 43 (Bankr. D. Idaho 1998) agreed that fax charges are potentially allowable to the extent they represent recovery

[12] Counsel's work in preparing the Application might have been compensable had it been seasonably performed, i.e., when it was the sole remaining issue impeding confirmation.

of actual costs incurred by the applicant. Here, the explanation of the methodology for the charges, and proof that it represents recovery of out of pocket costs, is lacking. The absence of similar explanation in *Young* led to a denial of all such costs. The Court has no reason to deviate from that result, and these charges of $137.00 are disallowed.

Post-petition payment and lack of disclosure

Earlier noted was the fact that Counsel received a $500 payment from the Debtors in May 1999, during the Belwood litigation. This raises, first, a question of propriety of payment.

There is no authority for a chapter 13 debtors' attorney to charge or collect post-petition fees from his clients without Court approval. Payment of the fees must be by Court order or under a confirmed plan. There is no room for unilateral billing and collection. *See, In re Hanson,* 223 B.R. 775, 778-79 (Bankr. D. Oregon 1998); *In re Phillips*, 219 B.R. 1001, 1009 (Bankr. W.D. Tenn. 1998); *Shealey v. Daughtry (In re Pair)*, 77 B.R. 976, 979-80 (Bankr. N.D. Ga. 1987).

In *Ferreira*, the Court noted:

> The Court has not authorized any payments to Applicant since the case was filed. While Applicant is entitled to credit any fees received from Debtor for services rendered after conversion to Chapter 7 without Court approval, <u>any payment for work done during the Chapter 11 or 13 cases must not be accepted without prior Court approval</u>. Applicant should account for these payments before any further fees are paid.

95 I.B.C.R. at 284-85, n.4 (emphasis supplied). *See also*, *In re Campbell*, 176 BR. 558, 562-63 (Bankr. D. Idaho 1994) (Counsel's receipt, without disclosure or Court

approval, of funds representing personal profit of chapter 13 debtor from asset transfer during pendency of a chapter 13 case without notice or Court approval was improper and funds must be disgorged.)

All post-petition funds of the Debtors are property of the estate under § 1306(a). Creditors have an interest in that property as a means of funding and performing the plan. *See, e.g.*, § 1325(b) (disposable income to be applied to make payments under the plan). Counsel's receipt of $500 reflects his access to property of the chapter 13 estate to the detriment of interested creditors.

Under § 1326(c), the Trustee must make all payments to creditors except as provided by the plan. The plan must deal with the claims of debtors' counsel for fees. *See*, § 1322(a)(2). Nothing in the Code provides for direct post-petition payment of claims by debtors except as may be provided in a confirmed plan.
§ 1326(c).

Compensation under § 330(a), including § 330(a)(4)(B), requires notice and hearing, through the plan process or separately. Until compensation is allowed, there is no claim to be paid. Counsel here circumvented the process of notice, Court review, allowance, and authorized payment.

Moreover, he never disclosed this payment until the post-dismissal Application was filed. He did not file a supplemental Rule 2016(b) disclosure in May of 1999 alerting the Court and the parties to the $500.00 payment he received as required by

the Rule itself[13] and applicable precedent. *See*, *In re Soderberg*, 99.4 I.B.C.R. 152, 153 (Bankr. D. Idaho 1999). Strict compliance is required, and a failure to properly and timely disclose is sanctionable even in the absence of any other inappropriate conduct. *Id.* Whether the violation was intentional or mere oversight, the Court may impose sanctions up to and including denial of all fees in a case. *Id.; see also, Dale's Crane*, 99.1 I.B.C.R. at 9.[14]

Even if a debtor's attorney could accept a post-petition deposit toward additional fees, to be held in trust pending Court approval of fees on notice and hearing, the disclosure requirements of Rule 2016(b) and § 329(a) cannot be ignored.

In recognition of the impropriety of this payment, and in order to provide an appropriate sanction for violation of the mandatory requirement of supplemental Rule 2016(b) disclosure and to discourage such conduct in the future, the fees and costs otherwise found allowable herein shall be reduced by $1,000.00.

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[13] "A supplemental statement shall be filed and transmitted to the United States Trustee within 15 days after any payment or agreement not previously disclosed." Fed.R.Bankr.P. 2016(b).

[14] Both *Soderberg* and *Dale's Crane* set forth the Ninth Circuit authority on the issue, and those citations are not repeated here.

CONCLUSION

In consideration of all the issues set forth above, the Court concludes that the request of Counsel has not been adequately supported under applicable law, and shall be reduced as follows:

(1) The total fees requested shall be reduced by $824.20, representing an amount equal to one-half of the legal fees and costs incurred regarding the litigation with Belwood;

(2) The total fees requested shall be reduced by $232.50 ($103.50 + $129.00) representing inadequately described or supported paralegal services;

(3) The total fees shall be reduced by $105.00, for time entries in which Counsel's services were lumped and reflected non-legal tasks;

(4) The fees of $210.00 claimed for work on January 13 are disallowed; and

(5) The requested fax charges of $137.00 are disallowed.

Counsel seeks total fees and costs, exclusive of the filing fee, of $5,668.00. With the above-described reductions, fees and costs will initially be allowed in the amount of $4,159.30.

However, that amount will be further reduced by $1,000.00 due to the improper and undisclosed post-petition payment from the Debtors. Therefore, fees and out-of-pocket costs in the amount of $3,159.30 will be allowed under § 330. Such allowance is entitled to treatment as a § 503(b)(2) administrative expense.

Counsel has previously received from the Debtors the sum of $1,030.00 for application toward this award.[15] The Trustee shall therefore distribute $2,129.30 to Counsel under § 1326(a)(2) on this allowed administrative expense.

An Order consistent herewith will be entered.

Dated this 24th day of March, 2000.

[15] $1,190.00 was received, as noted earlier in this decision, but $160.00 of that amount was in payment of the filing fee.